86 1398

Supreme Court, U.S.
FILED
FEB 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

Case No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation
Petitioner,

v.

PAUL BEASLEY JOHNSON
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

AND APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

Ia. WHETHER THE PREJUDICE PRONG OF STRICKLAND V. WASHINGTON ALONE SUFFICES TO SUPPORT A FINDING OF INEFFECTIVE APPELLATE COUNSEL ABSENT A FINDING THAT COUNSEL'S PERFORMANCE WAS DEFICIENT.

Ib. WHETHER APPELLATE COUNSEL WHO HAS RAISED ELEVEN NON-FRIVOLOUS APPELLATE ISSUES MAY BE RENDERED INEFFECTIVE FOR FAILURE TO RAISE AN ADDITIONAL ISSUE WITHOUT A FACTUAL DETERMINATION THAT THIS FAILURE WAS OTHER THAN A CONSIDERED DECISION ON THE PART OF APPELLATE COUNSEL.

II. WHETHER THE PREJUDICE PRONG OF STRICKLAND V. WASHINGTON IS SATISFIED WHERE APPELLATE COUNSEL FAILS TO RAISE A REVERSIBLE ISSUE THAT DOES NOT AFFECT THE TRUTH FINDING PROCESS OR A FUNDAMENTAL CONSTITUTIONAL QUESTION.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

1a. 8

THE FLORIDA SUPREME COURT'S DECISION FINDING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT RENDERED IN STRICKLAND V. WASHINGTON WHERE NO CONSIDERATION WAS GIVEN AS TO WHETHER APPELLATE COUNSEL'S PERFORMANCE WAS DEFICIENT.

Ib. 14

ABSENT A FACTUAL DETERMINATION AS TO THE REASONS APPELLATE COUNSEL OMITTED A CERTAIN POINT ON APPEAL, ADHERENCE TO THE DICTATES OF STRICKLAND V. WASHINGTON IS IMPOSSIBLE.

II. 20

THE AUTHORITATIVE VOICE OF THIS HONORABLE COURT IS NEEDED TO DEFINE OR REFINE THE ELEMENT OF "PREJUDICE" SUFFICIENT TO SUPPORT AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

CONCLUSION 26

CERTIFICATE OF SERVICE 27

APPENDIX:

OPINION OF THE FLORIDA SUPREME COURT A-1 - A-7

ORDER DENYING MOTION FOR REHEARING A-8

PETITION FOR WRIT OF HABEAS CORPUS, PAGE 27, (partial reproduction) A-9

TABLE OF CITATIONS

PAGE NO.

Alvord v. Wainwright,
725 F.2d 1282, 1291 (11th Cir.),
cert. denied, 105 S.Ct. 355 (1984).....10

Evitts v. Lucey,
469 U.S.__,105 S.Ct.__,
83 L.Ed.2d 821 (1985).....10, 25

Johnson v. Florida,
465 U.S. 1051 (1984).....5

Johnson v. State,
438 So.2d 774 (Fla. 1983).....5

Johnson v. Wainwright,
__ So.2d __ (Fla. 1986),
Case No. 68,319, opinion filed
Dec. 11, 1986, [11 F.L.W. 647].....1

Jones v. Barnes,
463 U.S. 745,
751 - 752 (1983) 10, 11 18, 20

Kimmelman v. Morrison,
477 U.S. _, 106 S.Ct. 2574,
91 L.Ed.2d 305 (1986).....22, 23

McMann v. Richardson,
397 U.S. 759 (1970).....12

Nix v. Whiteside,
475 U.S. __, 106 S.Ct. __,
89 L.Ed.2d 123 (1986).....14

Raines v. State,
65 So.2d 558 (Fla. 1953).....8, 18, 19, 20

Strickland v. Washington,.....8, 11, 15
466 U.S. 668 (1984).....21, 22, 23

OTHER AUTHORITIES CITED

UNITED STATES CONSTITUTION:

Title 28 U.S.C. §1257(3).....1

Amendment VI 2

Amendment XIV, §1 2

OPINIONS BELOW

The opinion of the Supreme Court of Florida in Johnson v. Wainwright, __ So.2d ____ (Fla. 1986), Case No. 68,319, Opinion Filed Dec. 11, 1986 [11 F.L.W. 647], is reproduced in the appendix at A-1 - A-7.

JURISDICTION

On December 11, 1986, the Supreme Court of Florida granted a petition for writ of habeas corpus brought by a Florida prisoner under sentence of death. A timely petition for rehearing was denied on January 9, 1987, and this Petition for Writ of Certiorari was filed within sixty (60) days of that date. The jurisdiction of this Honorable Court is invoked pursuant to **Title 28 U.S.C. §1257(3).**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI of the Constitution of the United States provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertined by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, §1, of the Constitution of the United States provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent, Paul Beasley Johnson, is an inmate of the Florida Department of Corrections. He was indicted by the grand jury of Polk County, Florida, on three counts of first degree murder, two counts of robbery, kidnapping, arson, and two counts of attempted first degree murder. After a trial by jury, the respondent was found guilty as charged on all counts and the jury recommended a sentence of death for each of the three first degree murder convictions. The trial court imposed the recommended death sentences as well as lesser sentences on the remaining convictions.

The respondent took an appeal of his convictions and sentences to the Supreme Court of Florida. The Public Defender's Office of the Tenth Judicial Circuit was appointed to represent Johnson on appeal. William C. McClain, Assistant Public

Defender, represented respondent and filed an eleven issue brief with the Florida Supreme Court. On August 25, 1983, the Florida Supreme Court affirmed respondent's judgments and sentences. Johnson v. State, 438 So.2d 774 (Fla. 1983). Thereafter, Johnson filed a petition for writ of certiorari with this Honorable Court, said petition being denied on February 21, 1984. Johnson v. Florida, 465 U.S. 1051 (1984).

Respondent appeared before the clemency board in November, 1985, and on January 16, 1986, then-Governor Graham signed a death warrant which was effective from February 12, 1986, until February 19, 1986. During the pendency of that warrant, respondent filed a petition for writ of habeas corpus with the Florida Supreme Court. The only claim presented therein which is germane to the instant petition for writ of certiorari was respondent's assertion that he was denied the

effective assistance of appellate counsel. The only instance of ineffectiveness upon which the Florida Supreme Court granted relief was the omission by appellate counsel of an issue concerning the failure to sequester the jury after deliberations had begun. The factual basis for this claim was set forth in the opinion of the Florida Supreme Court:

> Several hours after the jury had begun its deliberations on Johnson's guilt or innocence, the trial court allowed the jury to separate for the night. Johnson's trial counsel objected to this separation and requested that the jury be sequestered overnight.[1] The court denied both the objection and the request. The following morning trial counsel again objected to the procedure and moved for a mistrial. The

---

[1] Although the Florida Supreme Court stated that Johnson's trial counsel objected to the separation, the court neglected to state that the objection was made specifically on the advise of appellate counsel who was present at counsel table. See, Petition for Writ of Habeas Corpus at page 27. That page has been partially reproduced for inclusion in the appendix at A-9.

> court denied the motion. Appellate counsel did not raise this separation of the jury as an issue on appeal. (A-3)

The Florida Supreme Court held that if appellate counsel had raised the jury separation issue on appeal, a new trial would have been granted. Therefore, the Florida Supreme Court granted the writ and ordered a new trial. Following the denial by the Florida Supreme Court of a motion for rehearing filed by your petitioner, a motion to stay proceedings was granted by the Florida Supreme Court until March 10, 1987, to allow your petitioner to seek review before this Honorable Court.

REASONS FOR GRANTING THE WRIT

ISSUE I(a)

THE FLORIDA SUPREME COURT'S DECISION FINDING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT RENDERED IN STRICKLAND V. WASHINGTON WHERE NO CONSIDERATION WAS GIVEN AS TO WHETHER APPELLATE COUNSEL'S PERFORMANCE WAS DEFICIENT.

In its decision rendered in the instant cause, the Florida Supreme Court concluded that because appellate counsel failed to raise as an issue on direct appeal the separation of the jury for one night after the deliberations had begun, appellate counsel was ineffective. In an opinion totally bereft of analysis as to why counsel was deficient in his performance, the Florida Supreme Court declared that, based on Raines v. State, 65 So.2d 558 (Fla. 1953), reversible error occurred during respondent's triple homicide trial and a retrial is warranted. In so doing, the Florida Supreme Court overlooked the principles espoused in

Strickland v. Washington, 466 U.S. 668 (1984), with respect to the correct standards to be applied in determining whether a criminal defendant has been afforded reasonably effective counsel. In Strickland, this Honorable Court held that a reversal of a conviction or death sentence is required where, (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. As Justice O'Connor opined, "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id. at 687 (emphasis supplied) The failure of the Florida Supreme Court to even consider the question of whether appellate counsel was deficient in his performance is fatal to a constitutionally permissible finding of ineffective assistance of counsel.

This Honorable Court has recognized that there is a constitutional right of effective assistance of counsel on the first appeal as a matter of right. Evitts v. Lucey, 469 U.S. _____, 105 S.Ct. ____, 83 L.Ed.2d 821 (1985). Although this Honorable Court has not specifically defined the standards to be employed when considering a claim of ineffective assistance of appellate counsel, it is clear that there is no constitutional duty to raise every non-frivolous issue. Jones v. Barnes, 463 U.S. 745 (1983). The failure of appellate counsel to brief issues he reasonably considers to be without merit is not ineffective assistance of counsel. Alvord v. Wainwright, 725 F.2d 1282, 1291 (11th Cir.), cert. denied, 105 S.Ct. 355 (1984). Your petitioner submits that the standards enunciated in Strickland v. Washington, with respect to the effectiveness of counsel rendered during a criminal trial are equally

applicable to a consideration of whether appellate counsel rendered reasonably effective assistance of counsel. Thus, at the very least, the holding announced in Jones v. Barnes, requires consideration of the reasons why appellate counsel failed to raise an issue on appeal. In other words, there is a necessity to consider and determine whether the failure to brief an issue on appeal renders appellate counsel's performance so deficient as to require consideration of the prejudice prong to determine whether a criminal defendant received the effective assistance of appellate counsel. The Florida Supreme Court in its opinion granting habeas relief completely ignored the first prong of the Strickland test thereby impermissibly finding ineffective assistance of appellate counsel without consideration of whether counsel acted unreasonably.

Based upon certain Florida state court

decisions, the Florida Supreme Court concluded that the sequestration claim was a reversible issue on the merits. However, this conclusion does not necessitate a finding that appellate counsel's performance was deficient for failure to include the claim on appeal. An analogy may be drawn from the opinion of this Honorable Court rendered in McMann v. Richardson, 397 U.S. 759 (1970), wherein the issue of effective assistance of counsel was discussed in connection with the entry of a guilty plea. This Court noted that courts have differences among themselves with respect to the admissibility of evidence and, although the Supreme Court might hold a defendant's confession inadmissible, possibly by a divided vote, there is no justification to conclude that a defendant's attorney, in recommending a plea of guilty, was incompetent or ineffective when he thought the confession was probably admissible in

evidence. Id. at 770. In fact, this Honorable Court continued by observing that only gross error on the part of counsel when he recommended that the defendant plead guilty would constitute ineffective assistance of counsel. Id. at 772. Similarly sub judice, it has never been demonstrated that respondent's appellate counsel committed "gross error" or, indeed, any error at all, when he omitted the sequestration issue. Reasonably competent counsel could have justifiably omitted the issue based upon several factors. The failure of the Florida Supreme Court to even consider the question of whether appellate counsel acted in a deficient manner renders that court's finding of ineffective assistance of appellate counsel fatally flawed.

Once again, this Court has upon several occassions determined that, in order to obtain relief on a claim of ineffective

assistance of counsel, "The movant must establish both serious attorney error and prejudice." Nix v. Whiteside, 475 U.S. ___, 106 S.Ct. ___, 89 L.Ed.2d 123 (1986). As will be discussed immediately below, the Florida Supreme Court could not have permissibly found ineffective assistance of appellate counsel without considering the question of whether appellate counsel's performance was deficient.

ISSUE I(b)

ABSENT A FACTUAL DETERMINATION AS TO THE REASONS APPELLATE COUNSEL OMITTED A CERTAIN POINT ON APPEAL ADHERANCE TO THE DICTATES OF STRICKLAND V. WASHINGTON IS IMPOSSIBLE.

"[T]he proper standard for attorney performance is that of reasonably effective assistance." Strickland v. Washington at 687. A showing must be made that counsel's representation fell below an objective standard of reasonableness. Your petitioner submits that no such showing was made in the

instant case and, indeed, the Florida Supreme Court's opinion contains no analysis or discussion of the first prong of the Strickland test.

Of major significance, and overlooked by the Florida Supreme Court in its decision, is the fact that appellate counsel was aware of the sequestration issue prior to the preparation of the appellate brief. In his petition for writ of habeas corpus at page 27, included with the appendix at "A-9", respondent acknowledged that objection to the jury separation was made by defense counsel based upon advise of appellate counsel who was present at the defense table during trial. Thus, although cognizant of the possible point on appeal concerning the jury separation after deliberations had begun, appellate counsel did not brief this point. Your petitioner submits that there are three reasons why a known issue was omitted from the

defendant's brief on direct appeal:

1. Counsel inadvertently overlooked the point during his preparation of the brief; or

2. Counsel believed that the question of jury separation was a colorable issue which would not be successful on appeal (and, therefore, might detract from more meritorious claims); or

3. Counsel deliberately withheld the issue in order to obtain reversal several years after trial so as to make retrial more difficult for the state.

Based upon these three possibilities, we are unable to ascertain whether counsel performed reasonably where we do not know why counsel omitted the point on appeal. An evidentiary hearing should have been held as suggested by your petitioner in the motion for rehearing filed with the Florida Supreme Court to establish the factual reasons appellate counsel failed to brief the sequestration issue. If appellate counsel's reasons for omitting the claim were reasonable, it may be determined that counsel acted in an

objectively reasonable manner. The failure of the Florida Supreme Court to make a finding, based upon all relevant facts, as to whether appellate counsel acted reasonably, fatally flaws the holding of the Florida court. Depending upon the factual findings as to appellate counsel's decision making process, his performance may well have been within the range of competence demanded of attorneys in criminal cases. For example, focusing upon reason number two advanced above, i.e., the conscious decision not to include the sequestration claim, it may well be found that counsel acted reasonably:

> "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."

Jones v. Barnes, 463 U.S. 745, 751 - 752 (1983). A reasonable hypothesis can be propounded as to why appellate counsel might

have felt the sequestration claim was colorable and, hence, the non-inclusion of the issue might have been the act of a reasonably effective appellate attorney. Raines v. State, supra, was the only Florida Supreme Court precedent pertaining to jury sequestration at the time of respondent's trial. In Raines, the Florida Supreme Court held that a fifteen hour absence after deliberations had begun constituted reversible error. However, no judicial instructions were given admonishing the jury not to communicate with others or not to be influenced by outside sources, and the Florida Supreme Court concluded that the fifteen hour absence under no restraint whatsoever was cause for a reversal. Thus, Raines could have been distinguished by competent appellate counsel where a trial judge more than adequately instructs the individual jurors not to communicate with each other, with a spouse or other family members or with

friends. The trial judge in the instant cause further admonished the jury not to read anything or do anything outside the jury room concerning the trial. Upon the jury's return early the next morning, the trial judge in the instant case inquired as to whether any of the jurors had seen or heard anything which could influence their deliberations. Your petitioner submits that appellate counsel could have acted within the sphere of competence required of an appellate advocate in omitting the separation issue where the Raines decision was notable for the lack of trial court instruction as to communication with others. Inasmuch as there is no constitutional requirement that every non-frivolous issue be raised in an appellate brief, Jones v. Barnes, supra, appellate counsel sub judice should not be considered deficient for failure to raise a colorable issue.

Focusing upon reason number three, i.e.,

deliberate withholding of the claim, we cannot know without an evidentiary hearing whether counsel and his client chose this course of action as a matter of tactics.

Your petitioner submits that the failure of the Florida Supreme Court to consider whether appellate counsel acted in a reasonable manner based upon a factual determination as to whether the reasons an issue on appeal was omitted from the brief necessitates a summary reversal with instructions for the Florida Supreme Court to consider the standards for determining ineffective assistance of counsel as enunciated in Strickland v. Washington.

ISSUE II

THE AUTHORITATIVE VOICE OF THIS HONORABLE COURT IS NEEDED TO DEFINE OR REFINE THE ELEMENT OF "PREJUDICE" SUFFICIENT TO SUPPORT AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

In its decision, the Florida Supreme Court deemed appellate counsel's performance

to be ineffective where counsel failed to raise as an issue on direct appeal the question of the jury separation subsequent to the commencement of deliberations. The Florida Supreme Court determined that, if that issue had been raised on direct appeal, reversible error would have been made to appear requiring a new trial. Your petitioner submits that the Florida Supreme Court failed to apply a correct standard for determining whether a criminal defendant had been prejudiced by counsel's actions. Your petitioner further submits that this Honorable Court should accept certiorari of the instant cause in order to definitively determine the definition of the "prejudice" sufficient to support an ineffective assistance of counsel claim.

Although not set forth in this Court's opinion in Strickland, your petitioner submits that the correct standard to be applied

when determining prejudice can be found in the concurring opinion filed in Kimmelman v. Morrison, 477 U.S. ___, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). In his concurring opinion (in which then-Chief Justice Burger and then-Justice Rhenquist joined) Justice Powell observed:

> " . . . [T]he right to effective assistance of counsel is personal to the defendant and is explicitly tied to the defendant's right to a fundamentally fair trial - a trial in which the determination of guilt or innocence is 'just' and 'reliable'. Strickland, supra at 685 - 686, 696 . . . ." (emphasis added)

Kimmelman at 91 L.Ed.2d 331. Justice Powell continued by observing that a defendant who receives relief under Strickland does not receive a windfall, but rather reversal is to be predicated on the necessity to ensure a fair and just result. Id. at 331. Most importantly, " . . . only errors that call into question the basic justice of the defendant's

conviction suffice to establish prejudice under Strickland." Id. at 332. The basic justice of petitioner's conviction insofar as the sequestration issue is considered was not questioned at trial and, several years later, should not be questioned now.

As discussed above, appellate counsel advised that an objection be made as to the separation of the jury. A motion to sequester was made and denied, as was a motion for mistrial. Following the trial judge's inquiry of the jury as to possible outside influence following the overnight recess, no further proceedings were had concerning the issue. No motion for new trial, no petition for writ of error coram nobis, no pleading of any kind was filed challenging the jurors' ability to render a just and reliable verdict untainted by outside sources. We must assume that had any information been available indicating that even a sole juror was unable to

render an untainted verdict, such information would have been presented to the court. There is no indication that the separation of the jury for one night affected the ability of that jury to determine respondent's guilt. It is apparent that a guilty man was rightfully convicted by a jury which was never even alleged to be tainted. Under these circumstances, "The ultimate objective that the guilty be convicted and the innocent go free," Evitts v. Lucey, supra, has been effected.

The issue omitted by appellate counsel, which was the basis for the Florida Supreme Court's decision finding ineffective assistance of counsel, is not an issue which affects the truth finding process or a fundamental constitutional question. There is no constitutional requirement that a jury be sequestered and, hence, no fundamental rights of respondent have been affected. No

question concerning the guilt or innocence of respondent is called into question via the issue which was omitted from respondent's direct appeal brief. Had Justice Powell's standard for determining prejudice been employed by the Florida Supreme Court, it is apparent that it would have been determined that no prejudice was suffered by respondent sufficient to support an ineffective assistance of counsel claim. Your petitioner submits that this issue should be accepted by this Honorable Court in order to clearly define the meaning of "prejudice" and to give guidance to lower appellate courts in their application of the correct prejudice standard.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for a writ of certiorari and, with respect to Issues I(a) and I(b), summarily reverse the decision of the Florida Supreme Court where it is clear that the Florida Supreme Court failed to consider the question of whether appellate counsel was deficient in his performance. Your petitioner further submits that this Honorable Court should grant the petition for a writ of certiorari and grant plenary review with respect to Issue II, so that the question of "prejudice" may be authoritatively determined.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Robert J. Krauss

ROBERT J KRAUSS
Assistant Attorney General
1313 Tampa Street, Su. 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I ROBERT J. KRAUSS counsel for petitioner and a member of the Bar of the United States Supreme Court, hereby certify that on the 24th day of February, 1986, I served three copies of the Petition for Writ of Certiorari to the Supreme Court of Florida on Larry Helm Spalding, Capital Collateral Representative, Independent Life Building, 225 West Jefferson Street, Tallahassee, Florida 32301, by a duly addressed envelope with postage prepaid.

Robert J. Krauss

ROBERT J. KRAUSS
Assistant Attorney General
COUNSEL FOR PETITIONER

APPENDIX

SUPREME COURT OF FLORIDA

NO. 68,319

PAUL BEASLEY JOHNSON, Petitioner,

v.

LOUIE L. WAINWRIGHT, Respondent.

[December 11, 1986]

PER CURIAM.

Paul Johnson, a Florida prisoner under sentence of death, petitions this Court for a writ of habeas corpus. We have jurisdiction. **Art. V, §§3(b)(1), (9), Fla. Const.** We grant the writ and remand for a new trial.

A jury convicted Johnson of, among other things, three counts of first-degree murder and recommended that he be sentenced to death. The trial court imposed three death sentences on Johnson, and we affirm his convictions and sentences. Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). The governor signed

Johnson's death warrant in January 1986, and Johnson subsequently filed the instant petition.

Johnson raises two claims in this petition. First, he argues that this Court should stay his execution because the United States Surpeme Court is currently considering the constitutionality of "death qualifying" juries in Lockhart v. McCree, docket no. 84-1865 (argued Jan. 13, 1986). We have previously found this issue to be without merit. Kennedy v. Wainwright, 483 So.2d 424 (Fla.), cert. denied, 107 S.Ct. 291 (1986). Moreover, after Johnson filed this petition, the Supreme Court decided Lockhart adversely to his position. 106 S.Ct. 1758 (1986).

As his second point, Johnson claims that he received ineffective assistance of appellate counsel. We granted the requested stay so that oral arugment could be presented on the second issue. After reviewing this

matter we conclude that relief is warranted.*

Several hours after the jury had begun its deliberations on Johnson's guilt or innocence, the trial court allowed the jury to separate for the night. Johnson's trial counsel objected to this separation and requested that the jury be sequestered overnight. The court denied both the objection and the request. The following morning trial counsel again objected to the procedure and moved for a mistrial. The court denied the motion. Appellate counsel did not raise this separation of the jury as an issue on appeal.

In making the instant claim of ineffective assistance of appellate counsel Johnson relies on Livingston v. State, 458 So.2d 235 (Fla. 1984), and Raines v. State, 65 So.2d 588 (Fla. 1953). In Livingston we held that

---

* Johnson mentions five instances of ineffectiveness. Except for the jury sequestration issue, they are without merit.

"in a capital case, after the jury's deliberations have begun, the jury must be sequestered until it reaches a verdict or is discharged after being ultimately unable to do so." 458 So.2d at 239. Livingston relied on Raines, wherein this Court reversed for a new trial when the jury had been allowed to separate for fifteen hours after beginning to deliberate. Even though we did not file Livingston until a year after we affirmed Johnson's convictions and sentences, Raines embodied the law at the time of Johnson's trial and appeal. Under Raines reversible error occurred during Johnson's trial. We find, therefore, that appellate counsel provided ineffective assistance by not bringing this issue to our attention.

Relying on Engle v. State, 438 So.2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984), the state argues that Johnson's appellate counsel provided effective

assistance because Raines is materially distinguishable from the instant case. In Engle the trial court had instructed the jury not to discuss the case and not to read, watch, or listen to any media reports on the trial; no such admonishment had been made in Raines. The key difference between Raines and the instant case on one hand and Engle on the other, however, is that in Engle the parties stipulated to the separation. Engle does not make Johnson's appellate counsel's performance effective. Additionally, we did not file our opinion in Engle until after we had affirmed Johnson's convictions and sentences.

If appellate counsel had brought the jury separation issue to our attention on appeal, a new trial would have been granted. Johnson seeks a new appeal in the instant petition and, in fact, has demonstrated his counsel's ineffectiveness. In this

instance however, a new appeal would be redundant because we acknowledge that reversible error occurred at trial. Therefore, we reverse Johnson's convictions, vacate his sentences, and direct that he be retried.

It is so ordered.

McDONALD, C.J., and ADKINS, BOYD, OVERTON, EHRLICH, SHAW AND BARKETT, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding - Habeas Corpus

Larry Helm Spalding, Office of the Capital Collateral Representative, Tallahassee, Florida,

for Petitioner

Jim Smith, Attorney General and Robert J. Krauss, Assistant Attorney General, Tampa, Florida,

for Respondent

SUPREME COURT OF FLORIDA

FRIDAY, JANUARY 9, 1987

PAUL BEASLEY JOHNSON,

Petitioner,

CASE NO. 68,319

LOUIE L. WAINWRIGHT, etc.,

Respondent.

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for respondent,

IT IS ORDERED that said Motion be and the same is hereby denied.

TC
cc: Larry Helm Spalding, Esquire
Robert J. Krauss, Esquire

PAGE 27:

There is no question but that the right of defendant to a fair trial, a trial by an impartial jury, is a fundamental right guaranteed by the Sixth Amendment to the United States Constitution and Article I, section 16 of the Florida Constitution. Mr. Johnson was denied these rights during his trial. This was a highly publicized case with television cameras in the courtroom at all times. Defense counsel timely objected to the jury separation by requesting sequestration specifically on the advice of appellate counsel who was present at the time*, although the Raines decision did not even require this. [See Aff., Ex.]. Notwithstanding motions for sequestration, the court ignored the danger of separation. The court cited no emergency, accident or other special necessity that would have, at least given some justification for separation. The court's only reasons for

. . .

* Emphasis supplied by petitioner.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
MAR 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-1398

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Petitioner,

v.

PAUL BEASLEY JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

LARRY HELM SPALDING
Capital Collateral Representative

*MARK EVAN OLIVE
Litigation Coordinator

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
225 West Jefferson Street
Tallahassee, FL 32301
(904) 487-4376

*Counsel of Record

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Petitioner,

v.

PAUL BEASLEY JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

LARRY HELM SPALDING
Capital Collateral Representative

*MARK EVAN OLIVE
Litigation Coordinator

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
225 West Jefferson Street
Tallahassee, FL 32301
(904) 487-4376

*Counsel of Record

QUESTIONS PRESENTED

[As Stated By Petitioner]

Ia. WHETHER THE PREJUDICE PRONG OF STRICKLAND v. WASHINGTON ALONE SUFFICES TO SUPPORT A FINDING THAT COUNSEL'S PERFORMANCE WAS DEFICIENT.

Ib. WHETHER APPELLATE COUNSEL WHO HAS RAISED ELEVEN NON-FRIVOLOUS APPELLATE ISSUES MAY BE RENDERED INEFFECTIVE FOR FAILURE TO RAISE AN ADDITIONAL ISSUE WITHOUT A FACTUAL DETERMINATION THAT THIS FAILURE WAS OTHER THAN A CONSIDERED DECISION ON THE PART OF APPELLATE COUNSEL.

II. WHETHER THE PREJUDICE PRONG OF STRICKLAND v. WASHINGTON IS SATISFIED WHERE APPELLATE COUNSEL FAILS TO RAISE A REVERSIBLE ISSUE THAT DOES NOT AFFECT THE TRUTH-FINDING PROCESS OR A FUNDAMENTAL CONSTITUTIONAL QUESTION.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING WRIT	3
I. (PETITIONER'S QUESTION IA.) WHETHER THE PREJUDICE PRONG OF STRICKLAND V. WASHINGTON ALONE SUFFICES TO SUPPORT A FINDING THAT COUNSEL'S PERFORMANCE WAS DEFICIENT.	3
II. (PETITIONER'S QUESTION IB.) WHETHER APPELLATE COUNSEL WHO HAS RAISED ELEVEN NON-FRIVOLOUS APPELLATE ISSUES MAY BE RENDERED INEFFECTIVE FOR FAILURE TO RAISE AN ADDITIONAL ISSUE WITHOUT A FACTUAL DETERMINATION THAT THIS FAILURE WAS OTHER THAN A CONSIDERED DECISION ON THE PART OF APPELLATE COUNSEL.	4
III. (PETITIONER'S QUESTION II) WHETHER THE PREJUDICE PRONG OF STRICKLAND V. WASHINGTON IS SATISFIED WHERE APPELLATE COUNSEL FAILS TO RAISE A REVERSIBLE ISSUE THAT DOES NOT AFFECT THE TRUTH FINDING PROCESS OR A FUNDAMENTAL CONSTITUTIONAL QUESTION.	5
IV. THE DECISION OF THE FLORIDA SUPREME COURT RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND	6
CONCLUSION	10
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES:	Page
Abie State Bank v. Bryan, 282 U.S. 765 (1931)	6
Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 105 S. Ct. 355 (1984)	5, 6
Bales v. State, 418 N.E.2d 215 (Ind. 1981)	9
Engle v. State, 438 So. 2d 803 (1983)	7
Fox Film Corp. v. Muller, 296 U.S. 207 (1935)	6
Gibson v. State, 512 P.2d 1399 (Okla. Crim. App. 1973)	9
Gonzalez v. State, 593 S.W.2d 288 (Tenn. 1980)	9
Hargrave v. Wainwright, 804 F.2d 1182 (11th Cir. 1986)	4
Hughes v. State, 437 A.2d 559 (Del. 1981)	9
Johnson v. Wainwright, ___ So. 2d ____ (Fla. 1986), Case No. 68,319	1
Kimoktoak v. State, 578 P.2d 594 (Alaska 1978)	8
Klinger v. Missouri, 13 Wall 257 (1871)	6
Livingston v. State, 458 So. 2d 235 (Fla. 1984)	7
Mason v. State, 239 Ga. 538, 234 S.E.2d 79 (1977)	9
Michigan v. Long, 463 U.S. 1032 (1983)	6
O'Neill v. State, 642 S.W.2d 259 (Tex. Crim. App. 1982)	9
People v. Ritzert, 308 N.E. 2d 636 (1974)	9
Powell v. Alabama, 287 U.S. 45 (1932)	9
Raines v. State, 65 So. 2d 588 (Fla. 1953)	7
Reed v. Ross, ____ U.S. ___, 104 S. Ct. 2901 (1984)	5
Ridgway v. Ridgway, 454 U.S. 46 (1981)	6

State v. Smalls,
99 Wash. 2d 755, 665 P.2d 384 (1983) 9

Walker v. State,
410 N.E.2d 1190 (Ind. 1980) 9

White v. Maxwell,
174 Ohio St. 186, 187 N.E.2d 878 (1963) 9

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562 (1977) 6

STATUTES & RULES

Sec. 919.01(1), Fla. Stat. (1953) 8

Sec. 919.01(2), Fla. Stat. (1953) 8

Fla. R. App. Pro. 9.330(a) 4

Fla. R. Crim. P. 3.370 (1975) 8

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Petitioner,

v.

PAUL BEASLEY JOHNSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The unanimous Florida Supreme Court opinion below is reported at Johnson v. Wainwright, ___ So. 2d ___ (Fla. 1986), Case No. 68,319, Opinion filed December 11, 1986 (11 F.L.W. 647). (Appendix 1).

JURISDICTION

For the purpose of this pleading, and if this Court has jurisdiction to hear the claim raised in the Petition for Writ of Certiorari, see Argument IV, infra, Respondent accepts Petitioner's statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

In all criminal prosecutions, the accused

> shall enjoy the right ... to have the assistance of counsel for his defense;

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

For the limited purpose of responding to petitioner's petition for writ of certiorari, Respondent accepts petitioner's statement as to the case and facts.

REASONS FOR DENYING THE WRIT

I.

(PETITIONER'S QUESTION Ia.) WHETHER THE PREJUDICE PRONG OF STRICKLAND V. WASHINGTON ALONE SUFFICES TO SUPPORT A FINDING THAT COUNSEL'S PERFORMANCE WAS DEFICIENT.

The jury in Mr. Johnson's case was allowed to separate during their deliberation on guilt/innocence. This violates Florida law. Petitioner asks this Court to correct the Florida Supreme Court's 7-0 determination that Florida law was violated, that the violation required a new trial, and that Florida appellate counsel was ineffective for failing to raise the Florida law issue on direct appeal of the conviction and sentence of death. In this section, Respondent will demonstrate that Petitioner is wrong about what the Florida Supreme Court said and did. In Section IV, infra, Respondent will show that the decision below rests on adequate and independent state grounds, and that this Court's jurisdiction is wanting.

The Florida Supreme Court held that appellate counsel omitted an issue before the Florida Supreme Court which if raised

would have required a new trial in respondent's case. Logically, within that ruling is a ruling upon both the unreasonableness of counsel's omission and the prejudice that resulted: counsel is ineffective if he or she fails to raise an issue that would have given a capital defendant a new trial, and the prejudice from the omission is that the appeal proceeding would have produced a different result had the omission not occurred. The Florida Supreme Court could not have been much more explicit. As to "omission," the Court wrote:

> Raines embodied the law at the time of Johnson's trial and appeal. Under Raines reversible error occurred during Johnson's trial. We find, therefore that appellate counsel provided ineffective assistance by not bringing this issue to our attention.

App. 1, p. A-4.

As to "prejudice," the Court wrote:

> If appellate counsel had brought the jury separation issue to our attention on appeal, a new trial would have been granted. Johnson seeks a new appeal in the instant petition and, in fact, has demonstrated his counsel's ineffectiveness. In this instance however, a new appeal would be redundant because we acknowledge that reversible error occurred at trial. Therefore, we reverse Johnson's convictions, vacate his sentence, and direct that he be retried.

Id., p. A5-6

Petitioner boldly asserts that the Florida Supreme Court's opinion was "totally bereft of analysis as to why counsel was deficient," and that the Florida Supreme Court failed "to even consider the question of whether appellate counsel was deficient in his performance ...." Petition for Writ of Certiorari, pp. 8-9. Petitioner's reading of the Florida Supreme Court's opinion is inexplicable, and is quite simply wrong.